



WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
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TO: SENATOR ROBERT JAUCH

FROM: Larry Konopacki, Senior Staff Attorney

RE: Considerations for Local Governments Anticipating Ferrous Mining Within Their Jurisdictions

DATE: May 16, 2013

2013 Wisconsin Act 1 (the Act) created an expedited process and modified permitting standards to facilitate permits for ferrous mining in the state.¹ The Act became effective on March 26, 2013. You have asked for a summary of our conversations over the last several weeks about the potential role of local governments in the process of siting and regulating a ferrous mine under this new law, and some of the considerations that a local government may make in anticipation of the submission of a mining permit application for a project affecting the local government.

This memorandum begins with a brief explanation of some of the changes made under the Act to local authority that may relate to ferrous mining, then provides an overview of the process by which a local government may establish a local impact committee and negotiate and enter into a local agreement with a mining company, and offers other considerations that may be relevant for some local governments.

It is important to note that this memorandum does not seek to advise local governments as to the appropriate course of action with respect to preparing for or regulating the siting or operation of a mine. Each affected local government should evaluate its own interests and, seeking counsel when appropriate, make decisions about how best to proceed without reliance on this memorandum.

¹ 2013 Wisconsin Act 1 is described in detail in Information Memorandums IM-2013-02 and IM-2013-03, which are available on the Legislative Council website at: <http://www.legis.wisconsin.gov/lc>.

LOCAL REGULATORY AUTHORITY UNDER THE ACT

The Act made relatively few changes to local authority related to ferrous mining operations. For instance, the Act did not change the applicability of local zoning ordinances, with which a ferrous mining company must still comply. The following types of local authorities were changed by the Act.

Shoreland and Floodplain Zoning

The shoreland zoning and floodplain zoning programs operate as state and local partnerships, whereby the Department of Natural Resources (DNR) establishes standards which are incorporated in local zoning ordinances and enforced by local governments. The state's floodplain zoning program is also based on minimum requirements established by the Federal Emergency Management Agency, which requires states to have a floodplain zoning program in order to qualify for subsidized flood insurance and disaster relief in case of flooding.

Under prior law applicable to a ferrous mine, an applicant for a mining permit was required to demonstrate compliance with local shoreland and floodplain zoning ordinances, although the DNR could directly authorize specified mining facilities in certain areas, or municipalities could grant a special exemption or variance to accommodate a mining project.

The Act exempted specified activities relating to ferrous mining from shoreland zoning ordinances. Specifically, the Act provides that the DNR may not prohibit a waste site, structure, building, fill, or other development or construction activity in an area that would otherwise be prohibited under a shoreland zoning ordinance if the activity is authorized as part of a ferrous mining permit. It likewise provides that such activities do not violate county shoreland zoning ordinances if they are authorized by the DNR as part of a mining operation covered by a ferrous mining permit. Finally, the Act specifies that an applicant for a ferrous mining permit need not obtain a variance from a county shoreland zoning ordinance for such activities.

With respect to floodplain zoning, the Act specifies that municipal floodplain zoning ordinances may not prohibit development or construction activity authorized by the DNR in a mining permit except to the extent necessary for the municipality to maintain eligibility for participation in the National Flood Insurance Program.

Construction Site Erosion Control

The Act eliminated "prospecting permits" for ferrous mining. In lieu of a prospecting permit, the Act authorizes a person to submit a plan to the DNR before conducting "bulk sampling," defined to mean excavation by removal of less than 10,000 tons of material for purposes of assessing a ferrous mineral deposit. Under the Act, the DNR is the issuing authority for construction site erosion control and stormwater management approvals required for bulk sampling, notwithstanding any authority that has been granted to local governments to administer such approvals.

LOCAL IMPACT COMMITTEES

A county, town, village, city, or tribal government that is likely to be substantially affected by potential or proposed ferrous mining may designate a local impact committee for purposes of facilitating communications between mining operators and the governmental entity, analyzing the implications of mining, reviewing and commenting on reclamation plans, developing solutions to mining-induced growth problems, recommending priorities for local action, formulating recommendations to the investment and local impact fund board regarding distribution of funds, and negotiating a local agreement (described below). These governmental entities may form their own committees or joint committees with other governmental entities that are similarly affected.

Local impact committees may include representatives of affected units of government, business, and industry, manpower, health, protective or service agencies, school districts, or environmental and other interest groups or other interested parties. Committees may hire staff, enter into contracts with private firms or consultants or contract with a regional planning commission or other agency for staff services for mining-related purposes. Committees may be eligible for operating funds from the investment and local impact fund and may be able to receive funds to cover their costs associated with hiring legal counsel and other qualified technical experts in the areas of transportation, utilities, economic and social impacts, environmental impacts, and municipal services, and other reasonable and necessary expenses associated with the good faith negotiation of a local agreement.

LOCAL AGREEMENTS

Local agreements regarding the development of a mining operation may be executed between a mining company and counties, towns, villages, and cities in which at least a part of a proposed mining site is located and counties, towns, villages, cities, and tribal governments that require a ferrous mining company to obtain an approval from that governmental entity under a zoning or other land use ordinance. These governmental entities may enter into separate agreements or may join other governmental entities in joint agreements.²

A local agreement may include a number of components, including a description of the uses permitted on the property subject to the agreement, a description of any conditions, terms, restrictions, or other requirements determined to be necessary by the governmental entity for the public health, safety, or welfare of its residents, a description of any obligation undertaken by the governmental entity to enable the development to proceed, and the extent

² Both the Act and prior law provide for local agreements. Some details differ including the required components of those agreements and public hearings regarding execution of such agreements. This memorandum describes the requirements and procedure under the Act.

to which ordinances, approvals, or resolutions of a governmental entity apply to the operation.³

Past examples of local agreements show that a broad range of issues can be addressed through this tool. For example, the local agreement between Rusk County, the Town of Grant, and the City of Ladysmith and Kennecott Explorations regarding the Flambeau Mine addressed issues such as information sharing, surface water runoff and erosion, pit size restrictions, local drinking water impacts, prohibited activities such as smelting and underground mining, fencing requirements, transportation restrictions, road construction and maintenance obligations, local employment thresholds, and emergency planning, among many others. This agreement also provided for and detailed the calculation of payments to the local governments by Kennecott, and served as a waiver of various local regulatory requirements related to the site.

The agreement between Forest County and the Crandon Mining Company (CMC) regarding the then-proposed Crandon Mine similarly contemplated a broad range of issues. In addition to constituting a waiver of the county's shoreland zoning, floodplain zoning, and other laws and regulations and providing for payments to the county from CMC, the agreement also included provisions relating to guaranteed tax revenue, local employment, information sharing, limits on mining activities and methods, water quality measures, highway use and maintenance, and emergency services, among multiple others.

OTHER CONSIDERATIONS

Given the above authorities, a local unit of government that may be affected by a potential mine may choose to take certain steps to prepare. Such preparation may include some of the following considerations. Each governmental entity should seek appropriate counsel to advise it as to how best to prepare itself for and participate in the regulation of a mining operation.

Regulatory Review

The governing body of each governmental entity that may be impacted by a proposed or expected mine may want to review how its existing local regulations would apply to a potential mining operation. It may also want to review how such regulations fit within the scope of its regulatory authority, and evaluate whether changes to these regulations are appropriate. If a governmental entity anticipates wanting to make changes to its regulations, it should do so early in the process because it may lose the ability to apply certain types of new or revised regulations to a particular project as that project moves forward.

³ The broad authority of local governments to waive or create exceptions to zoning or other land use requirements under a local agreement was recognized in *Nicolet Minerals Company v. Town of Nashville*, 2002 WI App 50.

Negotiation of a Local Agreement

As explained above, local agreements can be used to address a broad range of concerns that a local government may have about a mining project. As evidenced by the example agreements noted above, governmental entities and mining interests use their respective forms of leverage to bargain for desired outcomes. A mining company typically agrees to make payments to a governmental entity and to obligate itself to take certain actions in exchange for local approvals or waivers. It is important for governmental entities to maintain their regulatory leverage if they intend to negotiate a local agreement.

Site-Specific Issues

There may be a number of additional issues for governmental entities to consider relating to the specific site where a proposed or potential mine would be located. For instance, there has been discussion of a potential ferrous mine in Iron and Ashland Counties. Apparently, the mining waste site for that project would be located on land owned by Iron County that is currently in the county forest program, and other portions of the potential mining site are in private ownership and are enrolled in the managed forest land program. Mining on such a site would require removal of this property from the managed forest land and county forest programs and the transfer of real property rights from Iron County to the mining company. Each of these actions would trigger a set of considerations for the governmental entity involved to weigh as it evaluates the impacts of a mining project. It is important for a governmental entity to utilize knowledgeable counsel to advise it on these types of actions, as each may have broad implications with respect to its goals related to economic and workforce development, the county forest system, long-term liability, budgetary issues, and many other factors.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

LAK:ksm